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TITLE: PRELIMINARY REPORT ON CONSTITUTIONAL LAW FACING THE LABOUR
TASK FORCE

AUTHOR: Professor E. E. Palmer,
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LONDON, Ontario.

assisted by:

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Mr. Ian Ross

Canada

DRAFT STUDY

prepared for

TASK FORCE ON LABOUR RELATIONS
(Privy Council Office)

PROJECT NO.: 7

L. Stuchlik

Submitted: December 1968

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INTRODUCTION

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TITLE: HUMANITY REPORT ON CONSTITUTIONAL TASK FORCE

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INTRODUCTION

Pursuant to your request of October 18, 1968, the following paper has been prepared on problems which might be faced by the Labour Task Force arising out of the constitutional division of authority in Canada. This paper was prepared by myself, together with Professors Atkey and Brandt. Mr. I. Ross, a lawyer, also assisted us. Due to the time limitation placed by you on this matter, i.e., that a preliminary report be prepared within one week of its assignment, much of the work here is based on insufficient research and suffers from a necessary lack of polishing. It follows, therefore, that this work has many defects.

The subject matter covered in this report follows the outline provided me. In general, this requires the asking of four general questions in relation to six areas of concern. The questions are:

- (a) what is the constitutional jurisdiction in the area of concern?;
- (b) what constitutional problems face the Board in light of their likely proposals?;
- (c) what methods are available to overcome these difficulties?;
- and (d) what methods seem most appropriate to overcome these difficulties?

The areas of concern are: (a) the operation of collective bargaining; (b) internal affairs of unions; (c) picketing and boycotting and enforcement of the civil law; (d) labour standards; (e) criminal jurisdiction in relation to substantive law and enforcement; and (f) prices in incomes board.

I have undertaken the preparation of the first two of these issues - collective bargaining and internal affairs of unions - and Professor Atkey has agreed to deal with (c) and (e). Professor Brandt has agreed to deal with (d) and (f). This division of authority seemed to reflect the teaching interests and, hence, expertise of the three of us.


Mr. Ross's role was to provide assistance for the three of us, but mainly he worked for me.

Finally, it might be noted that although an attempt has been made to follow the specific order set out above in certain cases some questions have been melded together in the interests of an explanation of our position and the requirements of time.

A. AREA OF CONCERN: COLLECTIVE BARGAINING

Object: To define the constitutional law problems relating to the following subjects, to list the methods of avoiding these difficulties and to suggest the most appropriate method of acting:

- (i) bargaining units
- (ii) dispute settlement procedure
- (iii) administration of collective agreements



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A. CONSTITUTIONAL ASPECTS OF COLLECTIVE BARGAINING

Up until 1925 there was little doubt as to the distribution of legislative competence with respect to labour relations: generally it lay with the federal government. However in Toronto Electric Commissioners v. Snider, [1925] A.C. 396 (P.C.), the question was raised whether the Industrial Disputes Investigation Act of 1907 was intra vires the federal government. The basis of the federal government's argument was the "Peace Order and Good Government" clause and/or section 91(2), the Trade and Commerce power. The provincial government based its claim on the "Property and Civil Rights" clause. The decision of the Privy Council, written by Lord Haldane, marked a low water mark in Canadian constitutional law. There, overruling Canadian decisions below, Lord Haldane held that it was "clear" and "obvious" that insofar as labour relations has an independent existence it goes to the province under the "Property and Civil Rights" clause rather than to the federal government.

The result of the Snider case was that labour relations was regarded as having two facets: (i) an independent existence for constitutional purposes and (ii) a necessary relation to a particular industry. The first went to the province and the second to the body which had the power to regulate the particular industry. In short, the federal government was only permitted to legislate with respect to the specifically enumerated industries in the British North America Act (e.g., Inter-provincial Railways, telegraphs, shipping and telephone), those in the residuary power such as radio, aerial navigation and atomic energy, and the power to legislate during war time.

Some problems arise out of the above rather bland statement: the division of industries between the federal and the provincial parliaments is not always obvious. Before looking at some of the more contentious issues, however, a sweeping and probably erroneous view ought to be put forward. It is that, seemingly contrary to the previous view of the courts, when an industry is within federal jurisdiction, it comes within federal jurisdiction completely; whereas provincial jurisdiction is based on the concept of collective bargaining, a phrase whose meaning is perhaps subject to greater change than factual findings as to the nature of industry. Again, the concept of labour relations must fight other concepts of an extremely general nature now given over to federal competence. Thus, the changing nature of an economy might limit the generally accepted meaning of competing constitutional concepts to the advantage of federal jurisdiction. In short, provincial jurisdiction fights a two-way battle to maintain its pre-eminence: against encroaching federal "matters" and changing forms of economic activity. One senses that it is perhaps a debilitating conflict.

I now turn to an examination of some of the more important areas of federal jurisdiction.

Undertakings Connecting Provinces

Section 92 (10) (a) of the British North America Act gives rise to many jurisdictional problems. This section reads: "In each Province the Legislature may exclusively make laws in relation to Local Works and undertakings other than such as are of the following

Classes ... Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province."

The basic problems which arise under the above section stem generally, from, truck or bus transport between the provinces or between a province and the United States. The two questions which arise are: (1) whether the company in question is an "undertaking" and (2) whether they actually connect two provinces or extend beyond the boundary of a province. In general, the first requirement is not a difficult one to prove: see Re Tank Truck Transport, 25 D.L.R. (2d) 161 (Ont. H.C., 1960), aff'd without reason 36 D.L.R. (2d) 636 (Ont. C.A., 1963). The second test is more difficult.

It is, in the first instance, clear that to "connect" there must be some actual work going on across the border. Thus a bus line between two provinces running on a regular basis clearly connects those provinces: Re Hull City Transport, 1 CLS 6-1001; CCH (49-54) P.16,001 (CLRB). In comparison, a paving company centred in one province which does work in another province does not connect the two provinces: Re Inter-provincial Paving Co., 1 CCH P.16,286 (OLRB, 1962).

The real problem centres around the situations where the work done between the two provinces is of a sporadic nature and minor to the general service of the company in question. This problem was first faced in the Tank Truck case, supra, where a company which carried on business in Sarnia and had 6% of its trade going to the United States

and Quebec on a steady basis, resisted an arbitration award on the ground that the company was not bound by its certification under the Ontario Labour Relations Act.

McLennan, J., said that the decision was one of fact and that this was a reverse of the Winner case, [[1954] 4 D.L.R. 657 (P.C.)], in that there the intra-provincial activity was incidental to the inter-provincial, i.e., there most of the work carried on was between provinces, here most of the work was done in only one province. He stated that the comparative volume of work done by the company was only in question where there was a colourable attempt to choose jurisdiction. "As appears from the Winner case and the Underwater Gas Developers case [24 D.L.R. (2d) 673 (Ont. C.A., 1960; aff'ng 21 D.L.R. (2d) 345 (Ont. S.C., 1959)], undertaking involves activity and I think to connect or extend, that activity must be continuous and regular, but if the facts show that a particular undertaking is continuous and regular, as the undertaking in this case, then it does in fact, connect or extend and falls within the exception in 10(a) regardless of whether it is of greater or less extent than that which is carried on in the province." He also rejected an argument that an undertaking must be of national importance before it can be brought under the Federal Act.

Thus it is clear that the volume of work done by a company in its inter-provincial aspect is unimportant in relation to jurisdiction. The Ontario Board has consistently followed the position in Tank Truck on this point. See, for example, Re Armstrong Transport, OLRB Mon. Rep., Dec. 1963, p.504, where a company regularly handled products in and out of Ontario and had yearly contracts with Office

Specialties Limited, 14 of its 17 vehicles being registered in that company's name. Although it did some work for other companies, Armstrong Transport regularly hauled 4 tons of Office Specialty furniture to Quebec, seemingly, none for other companies. These trucks were registered by Office Specialties for PCV licenses. Although no reasons were given, since the application was discussed it presumably fell under federal jurisdiction.

Again in Re Federal Farms, OLRB Mon. Rep., Oct. 63, p.341, an Ontario company which raised vegetables and sold 10% of its crops in Quebec and delivered these wares there two or three times a week was held to fall under federal jurisdiction. The Board again stated that the test was not the volume of business which went to Quebec, but rather "whether there is a continuous or regular pattern of business carried on in another province."

A similar position is taken by the Alberta Board. See Re M & P Transport, 1 CCH P.16,181 (Alta. Bd. Ind. Rel. 1960) where it was held that four or five of 57 drivers engaging in inter-provincial trade made the enterprise come under federal jurisdiction. See also Reg. v. Man. L.R.B., ex p. Invictus, 68 CLLC P.14,066 (Man. Q.B.).

Although the test which has generally been applied has been the one in Federal Farms, supra, in Re Desrosier Cartage, 1 CLS 6-1014; CCH (49-54) P.16,008 (O.L.R.B., 1949), it was held that "... the true test to be applied is whether the company has so arranged its physical properties and its operations so that its operations are carried on outside the province with a certain regularity or in accordance with a certain pattern." This slight divergence in language seems to point out the problem which arises next.

In one case the Ontario Board attempted to impose a different test as to the type of work which connects provinces. Thus, in Re Skinner School Bus Lines, OLRB Mon. Rep., Dec. 1964, p.441, the company in question had 17% of its business on charter work, of which 65% went to the United States. The Board decided that this was not a Tank Truck situation: "Since the respondents operations extending into the United States are totalling depending on desires of persons wishing to utilize the charter service offered by the respondent, we do not find a pattern or regularity in these operations which satisfies us that the Board is without jurisdiction to entertain this application. [p.442]"

This position, however, is untenable in light of the decision of Haines J. in Reg. v. Cooksville Magistrate's Court, ex p. Liquid Cargo Lines, 46 D.L.R. (2d) 700 [1965] 1 O.R. 84 (H.C., 1964). In that case a company was charged with an unfair labour practice under the federal act and it challenged the jurisdiction of the Canada Labour Relations Board on the basis of section 92 (10) (a) of the British North America Act. In this case extra provincial work only accounted for 1.06% of its total work and that was only done on the basis of individual orders and was very spotty. Therefore, the argument was that this was not "continuous or regular" qua Tank Truck. Haines J. rejected this position saying that you do not look at the work done, but rather at the company's ability and intention to provide extra provincial service when and if required. He also stressed licences obtained by the company in this case. Further he made it clear that no terminals were required outside the jurisdiction.

In Re Henry & Co., OLRB Mon. Rep., March 1965, p.646, the Board followed the Liquid Cargo Lines case rather than Skinner in a "non-schedule" situation. Again, in Re Pettapiece Cartage, OLRB Mon. Rep., December 1964, p.436, the Board also followed Tank Truck in the case of a branch of a company who had almost nothing to do with other branches who carried on a fairly large amount of international trade (25-30%). The reason was that the branches were directed from the head office and this became an integral part of a undertaking which connected provinces. Therefore, it is clear that the Liquid Cargo Lines has extended the meaning of regular and continuous as used in Tank Truck to mean something more like setting up a company to carry on international trade.

Jurisdiction Over Works For The General Advantage of Canada.

The law seems clear in Canada that if a work is declared to be for the general advantage of Canada then its labour relations fall within federal competence. Thus, since atomic energy has been declared to be a work for the general advantage of Canada, companies mining uranium will be brought under the federal act. This is shown in Pronto Uranium Mines v. O.L.R.B., 5 D.L.R. (2d) 342 (Ont. S.C. 1956), where McLennan J. stated:

"It seems to be clear that if the Atomic Energy Control Act and the Regulations are within the jurisdiction of Parliament, then by virtue of the opening words of section 53 of Industrial Relations and Disputes Investigation Act, or clause (h) thereof, the board constituted by that statute is the appropriate jurisdiction for certification of the employees of the applicant companies." [The IRDI Act applies to all persons employed by a work, undertaking, etc., that is within the legislative authority of the Parliament of Canada, including (h) "any work, undertaking or business outside the exclusive legislative authority" of the provinces.]"

McLennan J. also said that the legislation on atomic energy could be supported on the heading of the Peace, Order and Good Government clause and that it was natural to have labour relations fall under the same head.

Similarly, feed mills declared to be works for the general advantage of Canada by the Canadian Wheat Board Act, R.S.C. 1952, c.44, s.45, were held not to be within the jurisdiction of the O.L.R.B.:
Re Supersweet Formula Foods, OLRB Mon. Rep., June 65, p.212.

Similarly, see Re Algoma Central and Hudson Bay R. Co., 1 CLS 6-1079; CCH (49-54) P.16,029 (CLRB, 1953), where a railroad had been declared a work for the general advantage of Canada; but it was objected that it did not come within the federal Act because the IRDI had one section dealing with railways and another with works for the general advantage of Canada thus indicating that the former did not fall within the latter. The Board refused this saying the latter was a "catch-all" section.

Navigation and Shipping

S.91(10) of the B.N.A., which deals with "Navigation and Shipping" has also been an area where federal jurisdiction has been exerted. Thus, in Underwater Gas Developers v. O.L.R.B., 24 D.L.R. (2d) 673 (Ont. C.A. 1960); affirming 21 D.L.R. (2d) 345 (Ont. S.C.), the question was raised whether an enterprise drilling for oil in Lake Erie came under federal jurisdiction by virtue of that provision. The courts involved there took a view that one looked at the predominate nature of the enterprise to determine

under whose jurisdiction it fell. Thus, in the High Court of Justice, Smiley, J., distinguished cases giving the Dominion jurisdiction under this heading, such as the Stevedores case, [1955] 3 D.L.R. 721 (Can. S.C.), stating [at pp.349-50]:

"I think one must take the overall picture of the work and operation of this Company and I do not think in such light they could be described as being within ... [s.91(10)]."

Again, in the Court of Appeal, Aylesworth, J.A., stated:

"...[T]here is some 'navigation' and some 'shipping' in these operations between the shore and the drilling sites but those activities are strictly incidental and subordinate to a totally different activity and undertaking, namely the establishment and servicing of gas well sites; the 'dominant' features and objects of the undertaking are features and objects wholly within provincial jurisdiction."

This case was followed in Re Can. Dredge & Dock Co., O.L.R.B. File 10968-65, 7 Dec. 65.

In a related case, it is interesting to note that once within the heading of "Navigation and Shipping", and presumably any other similar federal heading, it is irrelevant if the activity is wholly intra-provincial: see Int. Longshoremen's Assn., Loc. 375 v. Picard, 68 CLLC P.14,124 (Que. C.A.).

In passing it should also be noted that in the area of "Navigation and Shipping" International Law has a role to play. In a series of cases the Canada Labour Relations Board has said that they will apply the traditional rules of International Law and, by virtue of comity, not deal with "foreign shipping" even though the vessel involved may

technically fall within federal jurisdiction. Thus, Board Chairman A. H. Brown said in Re Western Union Telegraph, 1 C.L.S. 6-1017; CCH (49-54), P.16,009 (Can. L.R.B. 1949):

"Considering that the Applicant is registered for the purpose of carrying on business in Canada and carries on operations in Canada in connection with which the ships are utilized, and that the employees are residents of Canada and signed on in Canada, and that the provisions of the Act are capable of enforcement against all interested parties, it is, in the opinion of the Board, immaterial in the particular circumstances of this case whether the ships are of Canadian or British registry or whether the employees have been signed on under British or Canadian Articles of Agreement. This conclusion is borne out by the provisions of Section 163(1) of the Canada Shipping Act which require the Master of every British registered ship (with some exceptions which are not applicable in this instance) shall enter into an agreement with every seaman whom he engages in Canada and carries as one of the crew in accordance with the form of agreement prescribed in the said Act or, that is to say, under Canadian Articles of Agreement."

Again, in Re Iron Ore Transport Co., 1 C.L.S. 6-1005; CCH (55-59) P.16,075 (Can. L.R.B. 1957), Board Chairman C.R. Smith stated:

"The rules of International Law have a bearing on these questions and require consideration. In the first place, Canadian Law recognizes the rules of International Maritime Law that the nationality of a ship is determined not by the nationality of its owner but by the state in which it is registered and whose flag it flies. Under this rule these ships, therefore, are to be regarded as British ships not Canadian ships. By Canadian as well as International Law Canadian courts have no jurisdiction over the ships and crews of other states except when they are within Canadian territorial waters. Again under International Law, recognized by Canada, one state through its courts or otherwise, for reasons of comity, may and usually does refuse to exercise jurisdiction over the ships and crews of another state while in the territorial waters of the first, in respect of many matters and particularly in respect of matters of internal management or discipline or relations between the master and crew. Labour relations are included within the terms 'internal management' and 'relations between master and crew.' "

See also: Re Commercial Cable Co., 1 C.L.S. 6-1088; CCH (55-59) P.16,095 (Can. L.R.B. 1957); Reg. v. C.L.R.B., ex p. Federal Electric Corp., 44 D.L.R. (2d) 440 (Man. Q.B. 1964); and Re Federal Electric, CCH P.16,293 (Can. L.R.B. 1963).

Companies Related to Federal Companies

In many cases, it is clear that a company will fall within federal jurisdiction. However, there may be a closely related company for which the question arises should it be treated similarly. The problem arose in Bachmeier Diamond and Percussion Drilling Co. v. Loc. 913, Mine, Mill and Smelter Workers, 35 D.L.R. (2d) 241 (Sask. C.A. 1962), where the plaintiff company was under contract to a crown corporation declared to be a work for the general advantage of Canada to do some drilling work. In this case the plaintiff objected to certification by the Saskatchewan Labour Relations Board and the court upheld their claim saying that the mere fact of working with a federal company was not enough to remove the prima facie jurisdiction of the provincial board. It held that there must be proof that the plaintiff's activities formed an integral part of or were necessarily incidental to the work of the crown corporation.

A similar position was taken in Reg. v. O.L.R.B., ex p. Dunn, 39 D.L.R. (2d) 346 (Ont. H.C., 1963) where the question arose whether the labour relations of the Northern Electric Co. was governed by the Ontario Act. There it was shown that the plaintiff company was

controlled by the Bell Telephone Co. - clearly a federal company who bought all its materials from Northern Electric and owned almost all Northern Electric's shares. On the other hand, Northern Electric sold almost all its products to Bell. Here McRuer, C.J.H., held that this was a provincial matter because to overcome the prima facie presumption of provincial jurisdiction there would have to be some strong factual connection between the companies which indicated an inseparable relationship. Here this was not proved since, it was argued, Bell could buy elsewhere.

A similar position was taken by the Canada Labour Relations Board in Re H.E.P.C. of Ottawa, 1 CLS 601041; CCH (49-54) P.16,016 (CLRB, 1950), where the company in question was the sole provider for hydro to a company in another province. There it was held that there were alternate sources of hydro available.

In the case of construction of federal buildings, however, boards seem to have taken a different tack and held that this would bring the contractors within federal jurisdiction. Thus in Re Robertson-Yates Corporation, OLRB Mon. Rep., Oct. 62, p.215, the Board held that it did not have jurisdiction over the contractor erect buildings pertinent to a bridge at Niagara Falls, such buildings being used for customs and immigration. Similarly, a company doing non-permanent construction work on part of the St. Lawrence Seaway was treated in the same way: Re Schwenger Construction, OLRB Mon. Rep., Feb. 65, p.576.

Division of Inter-Provincial Project

It is to be noted that Boards who only certify those parts of an inter-provincial undertaking which are integral to the maintenance of its inter-provincial nature. Thus, where a bus line had two depots in Ontario, one connecting Windsor with the United States and the other merely carrying on business in and out of Sudbury, they were separated for jurisdictional purposes: Re Eastern Canadian Greyhound Lines, 1 CLS 6-1011; CCH (49-54) P.16,006 (CLRB, 1949).

However, compare the practice of the Ontario Labour Relations Board in the Pettapiece Cartage case, OLRB Mon. Rep., Dec. 1964, p.436, where the Board certified a branch of a company which carried on no inter-provincial trade merely because the company as a whole did and the branch was directed from the head office who was concerned with international trade.

Labour Relations Boards and S.96 of the British North America Act

S. 96 of the B.N.A. Act gives jurisdiction with respect to the traditional common law courts to the federal government. Consequently, at one time there were attempts made to strike down the activities of provincial administrative boards as infringing on this power. Generally, it was thought that this issue was put to rest by the John East Iron Works case [1948] 2 W.W.R. 1055 (P.C.), which held such activity intra vires the constitution.

Various provincial labour boards, therefore, followed the John East case: see, e.g., Re Hollinger Bus Lines, CCH (49-54) P.17,017 (Ont. L.R.B. 1951). In the Ontario Food Terminals case, (38 D.L.R. (2d) 530

(Ont. C.A. 1963), however, Laidlaw, J.A., held that administrative boards not created by federal authority did not have the power to decide questions of law, although John East was not mentioned.

Fortunately, this point has not been raised again and, to the extent that counsel have argued it, they have been squashed unceremoniously. See this problem brought up on the basis that the Board could not decide constitutional issues in Re Armstrong Transport, OLRB Mon. Rep., Dec. 63, p.504. Here the Board said they did have the power to deal with these matters, even if they could not settle them in a jurisdictional sense. See also L.R.B.N.B. v. Eastern Bakeries, 26 D.L.R. (2d) 332 (Can. S.C. 1960); rev'ng 23 D.L.R. (2d) 635 (N.B.C.A. 1960).

B. CONSTITUTIONAL OBSTACLES FACING THE LABOUR TASK FORCE
IN THE AREA OF COLLECTIVE BARGAINING

The obstacles created by the present state of constitutional law in Canada in the realm of collective bargaining, as can be seen by the foregoing, are significant. Essentially, the problem of labour relations has been given to the provinces by the Snider case and there is little which can be done by the federal government within the realm of what is presently considered "collective bargaining" in Canada. In this respect it should be noted that this difficulty relates to the coverage of industries rather than a blanket denial of rights within the framework of collective bargaining legislation: once an industry falls within federal jurisdiction, the avenues of action open to it run the full scale of present methods of dealing with this subject; the problem is that so few industries fall into this area.

This analysis affects both the first two sub-areas of concern: the scope of bargaining units and dispute settlement procedures. Given control over an area of industry, nothing can prevent the federal legislative authority from establishing any bargaining unit it sees fit, whether it be regional, industry or nation-wide, or what ever. Similarly, the present range of methods of dispute settlements are open to the same authority. On the latter point, however, certain methods of dispute settlement might be so novel as not to fit within what has traditionally been considered "labour relations", "collective bargaining" or whatever name might be appropriate. Thus, a method of establishing limits on wages, etc., might fit more easily into the federal "Trade and Commerce"

power and so escape the limitations set out. To the knowledge of the writer, however, it seems such novel approaches are not necessarily anticipated, although a Prices and Wages Board [see infra] might so escape.

The administration of collective agreements would seem to follow a similar pattern of thought. It would appear that, given jurisdiction over an industry, the federal authority could set up such rules as it deemed expediant to deal with this matter. This item is inextricably tied to the whole framework of collective bargaining and so would not be carved out as a matter falling within "Property and Civil Rights" or some other provincial head of power.

Finally, as has been noted above no constitutional difficulties arise relating to the powers given the normal labour relations board. [For questions of criminal law, see infra.]

C. METHODS OF OVERCOMING THE CONSTITUTIONAL HURDLES

It would appear that five methods are open to avoid the difficulties outlined above: (i) judicial interpretation of the Snider case; (ii) arrangements under s.94 of the B.N.A. Act; (iii) constitutional amendments; (iv) declaration of "works" for the general advantage of Canada; and (v) federal-provincial inter-delegation of powers. These will be dealt with in that order.

Initially, however, it should be pointed out that the extent to which any of these solutions are feasible depends on the interest in obtaining uniformity evinced by influential persons and bodies in Canada. This topic is itself worth a great deal of study, the time for which is not now available. Suffice it to say that at one time such an impetus existed. Thus, immediately after Snider all groups concerned with labour matters sought and, to a great extent, achieved such a goal. Gradually, however, this zeal flagged and by the end of the Second World War diversity and a penchant for local solutions prevailed. Thus, since that time no record exists of a desire to have uniformity in this field. The only record of such a desire available to the writer is a resolution to this effect passed at the 1958 convention of the Canadian Labour Congress: see Proceedings of the Convention of the Canadian Labour Congress, 1958, p.11. This dismal record is outlined by Dean F. R. Scott in "Federal Jurisdiction over Labour Relations - A New Look", 6 McGill Law Jo. 153 (1959-60).

The point of the above is merely to indicate that any action on the following alternatives which demands broad support from persons

in the labour field is likely to fail. Having made this optimistic statement, I turn to the specific methods open to the Task Force.

(i) Judicial Interpretation of the Snider Case: This alternative is listed first because it would appear to be the most forlorn hope open to the Task Force. As a theoretical matter, wide grounds are available to distinguish Snider: does it only apply to municipal institutions?; did the then existing language of the IRDI Act colour the court's thinking?; does the rationale of Snider only apply to the procedures there envisioned? and so on. Such a matter could be brought to a head in a variety of ways: by a suit challenging provincial jurisdiction in an industry clearly of national importance; by a constitutional reference; or by a test of new federal legislation.

Although such an approach is challenging (and, indeed, may occur if the price is right), it appears doomed to failure. Judicial precedents seemed promising, although not wildly so, during the Fifties - Rand was in bloom. Since then the Supreme Court of Canada, the inevitable arbitor, has taken a decidedly "stand-pat" position in constitutional matters. Little hope is given for the patient when he arrives at the hospital.

(ii) Arrangements under s.94 of the B.N.A. Act: At the Quebec Conference, which was called to establish the principles of legislative union, it was agreed that the federal government should have a specific power to provide for uniformity of provincial laws (except

those of Quebec). This resolution received such strong support in the provincial legislatures that an even greater federal power in this area was adopted by the London Conference of 1866. For unexplained reasons, however, the final wording in the innocuous section ninety-four of the British North America Act was weaker than the earlier resolutions. By it the Dominion was only given power to make provision for uniformity of laws relating to property and civil rights in the three common law provinces; and any federal act designed to do this required adoption by the legislature of the province before it had any operative effect in such province. Only when an act had been thus adopted did the Dominion acquire in perpetuity full legislative power to deal with its subject matter.

This provision, therefore, contributes little to the cause of uniformity: it requires a voluntary surrender of legislative competence by a province - a rather far-fetched possibility in Canada today - and it is far from clear whether it only covers the three named provinces or all provinces except Quebec. In any event, it has never been used. In 1869, the Dominion attempted to move under this section. A Commission was appointed which brought down a favorable report two years later, but the matter was not mentioned again. Indeed, except for a speech in the House of Commons in 1912, and an occasional academic outburst, the section has remained a dead letter to this day and there is little prospect that there will be any change. Consequently, this again provides little help for the Task Force.

(iii) Constitutional Amendment: Clearly, one of the simplest ways of dealing with this matter would be by constitutional amendment. Indeed, as late as 1951 this has been done. One would assume, however, that this is not an immediate possibility, although time and a method of "repatriating the constitution" might ease the difficulties. The basic problem here, however, is the extent to which, as a political matter, this can be done. As noted earlier the pressures are not apparent to make this alternative feasible.

(iv) Declaration of "Works" for the General Advantage of Canada: The Parliament of Canada can, at present, declare "works" to be for the general advantage of Canada (or of two or more of the provinces), whereupon they come under federal jurisdiction. Indeed, as has been seen, this power has already been used and so brought a wider scope to federal labour legislation. [See s.53(g) of the IRDI.] This procedure is simple and achieves the result sought by the Force. It has the merit of requiring no related acts by provincial legislatures; the federal government can do it by itself. It suffers, however, from two defects: first, the scope of a federal labour statute would be settled on a piece-meal basis (a not altogether negative factor); and, second, it brings the industries so treated into the federal sphere for all purposes and not solely for labour relations.

(v) Federal-Provincial Interdelegation of Powers: In this area a great deal of flexibility is possible. The delegation of powers from one legislature to another is always possible, providing the dele-

gation is not one which moves into the area of what the courts call "abdication." The cases on this distinction are legion and the techniques involved well-known. Because of limitation of time, therefore, it is not necessary to go into this fully.

This approach has an attraction at first flush which does not last. Its basic weakness is similar to that relating to s.94 of the B.N.A. Act and other arrangements requiring mutual co-operation: the impetus to co-operate is not there. Thus, s.62 of the IRDI Act presently provides for arrangements with provinces for extended application of its provisions. It has had dismal results: except for sporadic usage by minor provinces (in terms of labour relations), it has been a dead letter.

D. SUGGESTIONS

From the foregoing it seems clear that the only feasible method of dealing with this area of concern under existing constitutional provisions is by declarations of "works" to be for the general advantage of Canada. Although certain drawbacks have been mentioned, they do not seem to be particularly offensive: the piece-meal aspect is balanced by the fact that this gives the federal authority the control of only those industries it feels appropriate for its activities; the problem of the total inclusion for all purposes of those "works" so declared is theoretical and examples of difficulties do not spring readily to mind. Balanced against this is the fact that this is something that can be done by the federal legislature alone - the provinces cannot veto the scheme. Thus, this would seem a practical and viable method of dealing with the problems adumbrated above.

As to constitutional amendment, it is difficult for the writer to assess its possibility. Generally, if it can be done as a political matter, it seems the best way to deal with the matter. The trend of political action, however, makes one less than sanguine concerning chances on this head. Again, given the status of the previous course of action outlined, one would tend to accept it and leave the problem of constitutional amendment for a later day.

B. AREA OF CONCERN: INTERNAL AFFAIRS OF UNIONS

Object: To define the constitutional law problems relating to the following subjects, to list the methods of avoiding these difficulties and to suggest the most appropriate method of acting:

- (i) legal status
- (ii) "Bill of Rights"

A. PROBABLE AREAS OF CONCERN

It is my understanding that the Task Force will basically make recommendations in relation to the following areas: union security and check-offs; internal union affairs relating to members' rights (the right to join a union as it affects job opportunities, the right to remain in a union, and control of the day-to-day affairs of a union); ratification and strike votes; and political action. The more specific aspects of these problems are set out in Task Force Memorandum #2 and may be assumed to be incorporated in my thinking.

In this section much of what has been said in the previous section also applies. It will be unnecessary, therefore, to go over this ground again. For similar reasons, I have not used the same format.

B. GENERAL CONSTITUTIONAL PROBLEMS

Initially, it should be indicated that the above problems have two aspects from a constitutional law point of view: on the one hand they can be looked at from the basis of federal control over private (generally unincorporated) associations; on the other, they may be regarded as aspects of other specific problems. For example, political action can be regarded as a matter inherent in a private organization or as a matter of general import to the jurisdiction involved. This distinction is one of some importance to the Task Force for the reasons that follow.

First, it appears that control of organizations such as trade unions prima facie falls to provincial jurisdiction under the rubric "Property and Civil Rights, etc." Although I do not have any immediate authority for this dictum, I am sure this is the case. The whole legal characterization of these entities and the general thrust of constitutional jurisprudence and actual legislation point to this conclusion. This division of power is shown by the Trade Unions Act, R.S.C. 1952, c.267, s.6 esp., which permits unions, by voluntary action, to gain rights under this federal legislation. Thus, attempts to promulgate federal legislation on trade unions per se would probably fail in whole or in part. In short, an analogy on jurisdiction may be made to the field of corporations: the federal government can enact permissive legislation, but it cannot require all unions to conform to standards it sets.

The second aspect of this problem is that the federal government does have clear power over trade unions which operate in certain areas of activities. Specifically, to the extent that unions must seek certification under federal legislation in relation to collective bargaining, such unions may be compelled to comply with requirements of that legislation which touch on the matters here in question. Thus, federal collective bargaining legislation may require all unions operating in its jurisdiction to live up to standards set out in that act. Such a view means that, under now typical legislation, "qualified unions" must meet certain standards in relation to their constitutions and negotiated collective agreements.

Taking this approach, therefore, most of the items set out above can be legislated on by the federal government. Union security is one aspect of the terms of collective agreements. It seems clear that on this head or as a part of the certification procedure unions, if they are to operate in the federal jurisdiction, must live up to the standard set. Similarly, to represent employees in the federal domain, unions can be required to meet certain standards in their constitution and general practice regarding members, both actual and potential. Again, the federal control over ways of bargaining brings questions such as strike and ratification votes within the competence of this body. Finally, political contributions can be dealt with on a similar heading or, in any event, in so far as it effects federal elections and political parties.

C. CHOICE OF APPROACH

From the foregoing it seems clear that the second method of dealing with this problem is the only feasible one. This approach, however, has some shortcomings. Generally speaking, these deficiencies are those made earlier for collective bargaining as a whole: the coverage of industries is limited. Thus, although the federal government could fully implement the Task Force's suggestions for both certified and un-certified unions, the persons affected would not be sufficiently broad. It is unnecessary to cover this point again. Nor is it necessary to go over the alternative methods of ameliorating these difficulties: my earlier suggestions apply here equally.

C. AREA OF CONCERN: PICKETING AND BOYCOTTING
AND ENFORCEMENT OF THE CIVIL LAW

Object: To define the constitutional law problems, to list methods of avoiding these difficulties and to suggest the most appropriate methods of acting in relation to picketing and boycotting and enforcement of the civil law.

A. CONSTITUTIONAL ASPECTS OF PICKETING, BOYCOTTING AND ENFORCEMENT
OF THE CIVIL LAW

To the extent that picketing involves conduct which is criminal in nature, it may be regulated by the federal government through its jurisdiction over Criminal Law (section 91(27) of the British North America Act). This jurisdiction has been exercised to some degree in Section 366 of the Criminal Code (watching and besetting) and other provisions relating to trespass and assault. However, the great bulk of picketing activities are not criminal in nature, but are regulated and/or prohibited by judicial application of tort law at the behest of the person who is object of the picket: conspiracy to induce breach of contract, interfere with favourable trade relations or intimidate; assault and battery; defamation; trespass; and nuisance. These common law (and to some extent, statutory) tort actions are clearly "civil rights in the province" and hence within the legislative jurisdiction of the provincial legislatures, (section 92(13) of the British North America Act). Therefore, any attempt by Parliament, in the absence of an overriding federal interest, to take away these common law or statutory rights of action in the provinces would be ultra vires.

Picketing, as a legitimate medium of persuasion used by organized labour, might also be said to be an integral part of the field of labour relations. In this case, all picketing activities would, with the exception of picketing against enterprises under the exclusive legislative jurisdiction of the federal government, come under the legislative jurisdiction of the provinces on the basis of Toronto Electric Commissioners v. Snider

[1925] A.C. 396 (P.C.). That case held that federal legislation prohibiting strikes and lock-outs in certain circumstances was ultra vires as being legislation in relation to "property and Civil Rights in the Province", even though the legislation was directed towards the maintenance of industrial peace throughout Canada. Therefore, to the extent that governmental regulation and/or prohibition of picketing was to be directed towards the maintenance of industrial peace, and was to be considered as labour relations legislation, it would be within the exclusive jurisdiction of the provinces insofar as non-federal enterprises were concerned. This view is substantiated by the decision in Att.-Gen. Canada v. Att.-Gen. Ontario (Labour Conventions), [1937] A.C. 355 (P.C.), in which federal legislation relating to conditions of employment in industry and designed to implement certain international conventions, was held to be invalid as impinging on the jurisdiction of the provinces in relation to "property and civil rights".

There is one ingredient of picketing, however, that is not necessarily present in strikes and lockouts (Snider) or in the maintenance of certain conditions of employment (Labour Conventions). This is the matter of freedom of speech. Not only is picketing an economic sanction used by organized labour to prevent an employer or his allies from continuing operations during a legitimate labour dispute, but it is a means of communicating certain information to the general public so as to encourage a general boycott of that employer's products or services by the community at large, as an added sanction.

Whether the ingredient of freedom of speech is sufficient to bring the regulation of picketing and boycotting under federal jurisdiction is a matter which

has never been judicially determined. In the case of Koss v. Konn (1962), 30 D.L.R. 242 (2d) 242 (B.C.C.A.), provincial legislation which prohibited all primary and secondary picketing except during a lawful strike or lock-out was held to be valid as legislation in relation to property and civil rights in the province, and not directed to suppression of free speech even though it limited what one person could say about another and his business. However, one judge (Norris, J.A.) dissented on the ground that the prohibition embraced any member of the public conveying information, and amounted to such a sweeping restriction on dissemination of information on matters of general public interest as to be beyond provincial competence and an encroachment on matters within exclusive federal competence. In support of his position, Mr. Justice Norris cited the leading constitutional decisions which have invalidated provincial legislation on the ground, inter alia, of an impingement of the implied right of freedom of speech which is the exclusive jurisdiction of the federal government: Re Alberta Statutes, [1938] S.C.R. 100; Boucher v. The King, [1951] S.C.R. 265; Switzman v. Elbling and Att.-Gen. Quebec, [1957] S.C.R. 285.

The interrelationship of provincial legislation and an implied freedom of speech and expression was further clarified in two recent cases: McKay v. The Queen, [1965] S.C.R. 798; and Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd., [1963] S.C.R. 584. In the former case, the court invalidated a municipal bylaw which prohibited, inter alia, election signs on private property which solicited votes for political candidates, on the ground that the right of an elector to influence fellow electors in a federal election could only be prohibited by Parliament.

The latter case concerned the validity of provincial legislation which prohibited political contributions by trade unions from funds collected as dues by way of automatic check-off; the Supreme Court of Canada, on a four to three decision, upheld the provincial legislation as a protection of the rights of individual employees to give to the political party of their choice without having the union decide. The dissenters claimed that the legislation interfered with federal political activity, a matter over which only Parliament could legislate. In any event, all members of the Court were of the opinion that only Parliament could absolutely prohibit all forms of political activity in federal elections.

Therefore, if the dominant interest in picketing activity is freedom of speech, then Parliament might well overcome the constitutional difficulties of tort law jurisdiction, section 92(13) of the B.N.A. Act and the Snider case by virtue of the resulting constitutional incompetence of the provinces in this matter. However, this would depend on the care with which federal legislation relating to the "why", "when" and "where" of picketing was drafted. An additional restraint on federal picketing legislation insofar as it purported to limit certain aspects of picketing, would be the sections in the Canadian Bill of Rights protecting freedom of speech and freedom of assembly and association.

The only specific constitutional provisions in Section 91 of the British North America Act, other than criminal law (to be discussed later in this section), under which the federal government might justify picketing legislation are section 91(2), the Trade and Commerce clause, and the Peace, Order, and Good Government clause.

There are no reported cases under which legislation in any way similar or analogous to picketing legislation has been supported under 91(2). The only federal "labour" legislation supported under the general clause was the Maritime Transportation Unions Trustees Act, 1963 which was passed to remedy an emergency situation in the maritime unions in Canada. However, this legislation was also supported under Parliament's exclusive jurisdiction over matters of "navigation and shipping" (section 91(10) of the B.N.A. Act): Swait v. Board of Trustees of Maritime Transportation Unions (1967), 61 D.L.R. (2d) 317 (Que. C.A.) .

With respect to the enforcement of the civil law, provincial jurisdiction in matters of "civil rights in the province" (section 92(13)) and in matters of "administration of justice in the province . . . including procedure in civil matters in [provincial] courts" (section 92(14)), would seem to give the provinces exclusive competence. This jurisdiction would relate to the use of the equity injunction, contempt of court, rules for the determination of civil damages and general rules as to the commencement and conduct of civil actions.

However, to the extent that Parliament might validly enact legislation relating to the "why", "when" and "where" of picketing (a matter fraught with some difficulty as indicated earlier), it might prescribe the procedure through which it is to be enforced in provincial courts and elsewhere: Att.-Gen. Alberta and Winstanley v. Atlas Lumber Co., [1941] S.C.R. 87; Re Etmanski and Taggart Service Ltd., [1966] 1 O.R. 473 (C.A.).

Federal legislation which validly codified the substantive law of picketing as to "why", "when" and "where" could be enforced by federal tribunals and officers, even to the point of issuing prohibiting, restraining and mandatory orders, including the payment of compensation. In the case

of Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen, [1956] S.C.R. 303; the court upheld the validity of a clause in the federal Combines Investigation Act ; allowing a superior court to prohibit the continuation or repetition of an offence under the Act, as a valid exercise of the federal criminal law power (section 91(27)).

Then in Swait v. Board of Trustees of Maritime Transportation Unions, supra, the Quebec Court of Appeal upheld the validity of section 15 of that federal Act which conferred exclusive jurisdiction over injunction applications in relation to any act or omissions of the Trustees on the Exchequer Court of Canada, rather than on the superior courts of the province.

Therefore, to the extent that the federal codification of certain aspects of the law of picketing was in itself within federal competence, then federal enforcement measures would be valid.

With respect the "how" of picketing which we recommend be left to the substantive law and the provincial courts, the federal government is powerless to provide sanctions, except indirectly through the removal of the "why", "where" and "when" of picketing from the common and civil law of civil wrongs and the resulting spill-over of stated legislative policy to the decision-making processes of the courts.

B. PROBLEM AREAS: POLICY ALTERNATIVES: RECOMMENDATIONS

The greatest constitutional obstacle to overcome is in the federal codification of the "why", "when" and "where" of the substantive law of picketing. It is seriously doubted whether carefully drafted legislation will overcome the difficulties of the Snider case and section 92(13) of

of the B.N.A. Act, notwithstanding the extra ingredients of freedom of speech, criminal law, and a possible reference to the Peace, Order and Good Government clause. All other obstacles, particularly those related to enforcement of the codified rules, hinge on this primary issue.

The lack of federal competence to enforce the substantive law of civil wrongs is clearly recognized, but will have to be overcome if our recommendations are to be adopted in their entirety.

The alternatives open are clear. Under the present constitution, there must be either a judicial reconsideration of the Snider case or there must be a provincial delegation of necessary powers over picketing to the federal Labour Relations Board and its public enforcement officer. A third alternative might be the careful drafting of the federal legislation in the hopes of avoiding the Snider obstacle, although it is doubted whether such legislation would adequately be able to spell out the "why", "where" and "when" of picketing in accordance with our recommendations.

At the present time, delegation would appear to be the best vehicle to overcome the primary constitutional obstacle. It would appear that delegation will be necessary in order to implement other recommendations made, such as the authority and the jurisdiction of the Regional Commissioners and the Labour Relations Board in matters arising in disputes falling within provincial jurisdiction, or the authority of the public enforcement officer if he is to administer the law from both jurisdictions. In short, the implementation of our recommendations in relation to picketing and boycotting will depend very heavily on federal-provincial cooperation.

In the long run, these obstacles would best be overcome through constitutional amendment whereby the field of labour relations was made an exclusive federal power.

D. AREA OF CONCERN: LABOUR STANDARDS

Object: To define the constitutional law problems, to list methods of avoiding these difficulties and to suggest the most appropriate methods of acting in relation to labour standards.

A. LEGISLATIVE AUTHORITY

It is clear that the primary responsibility for legislation in respect of labour standards is given to the provincial governments by the Constitution. In a reference to the Supreme Court of Canada requesting an opinion as to the extent of the competence of the federal government to implement the "Draft Convention Limiting the Hours of Work in Industrial Undertakings" the Court articulated the scheme whereby legislative authority over these matters is divided: In the matter of Legislative Jurisdiction over Hours of Labour, [1925] S.C.R. 505, It was there stated that legislative jurisdiction is primarily vested in the provinces subject to the qualification that a province has no authority to regulate the hours of employment of federal civil servants or of persons employed in enterprises falling within the scope of Dominion authority by virtue of sections 91 (29) and 92 (10), that is, interconnecting transportation and communications undertakings. Therefore, federal competence in this field cannot be premised on any general responsibility in respect of employer-employee relations but rather on its authority in respect of certain specific activities the regulation of which includes the regulation of labour standards. Such specific activities include those enumerated in s. 91 and referred to by Duff J. in Legislative Jurisdiction over Hours of Labour, those falling within the federal residuary power, e.g., atomic energy and uranium production, and those encompassed by a declaration under s. 92 (10) (c) of the B.N.A. Act.

Until recently there was some question as to whether there was any provincial competence in respect of the specific activities granted

to the federal government in the event that the latter had not "occupied the field" or had done so only to a limited extent. In certain areas the courts have permitted a situation whereby the federal authorities may have jurisdiction to lay down broad minimum standards of conduct leaving the provinces free to go further if they so desire. Had such a situation developed in the field of labour standards it is constitutionally conceivable that there could be two different sets of labour standards: a minimum federal standard, e.g. 48 hours per week and a provincial standard going somewhat further, e.g. 44 hours per week. The federal occupation of this jointly shared field would be to the extent of preventing any employer from employing for more than 48 hours per week but no further. This would leave it open to a provincial legislature to go further in reducing the maximum employment permissible.

The possibility of this occurring in respect of labour standards has been prevented by the recent decision of the Supreme Court of Canada in Commission Du Salaire Minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767. There the question was as to whether or not the Minimum Wage Act of Quebec was applicable to the Bell Telephone Company prior to the passage of the Canada Labor (Standards) Code. The court held it was not applicable even in the absence of federal legislation arguing that the regulation of employer-employee relationships is so integral a part of an undertaking that exclusive legislative authority in respect of such matters vests in that body having legislative authority over that undertaking in general.

Therefore, the main problem to be resolved in describing the extent of the federal competence in respect of labour standards is to

define the activities or undertakings over which the federal Parliament has authority. In this regard it should be noted that some Courts have recently taken a rather broad view of the meaning to be ascribed to the expression "interconnecting undertaking." Cases have arisen involving the questioned jurisdiction of provincial or federal labor boards over employers whose activities seem to span both federal and provincial areas of competence. In these cases the courts, in attempting to identify and define the "undertaking" which is in fact being carried on, have tended to consider an enterprise or an undertaking as interconnecting and therefore a matter of federal control, even though a comparatively small percentage of its activities could be regarded as interprovincial or international in nature: Re Tank Truck Transport Limited, [1960] O.R. 497; R. v. Cooksville Magistrate's Court, Ex. p. Liquid Cargo Lines Ltd., [1965] 1 O.R. 84. The test postulated has been one of determining whether or not the interconnecting aspects are regular and scheduled and whether or not the enterprise holds itself out as engaging in such activities.

Another type of situation in which there is an apparent overlap of activities is that which occurs when various services come together in the completion of one activity. Although the Supreme Court of Canada in the Stevedoring case, [1955] S.C.R. 529, took the view that both the stevedores and the clerical staff were an integral and necessary part of the activity of "shipping", a recent decision in the Ontario High Court suggests a narrower approach. In Re Colonial Coach Lines Ltd. et al. and Ontario Highway Transport Board et al., [1967] 2 O.R. 25, Donohue J. held that the transportation of passengers from Metropolitan Toronto to Toronto Airport, though it may have been a convenience to the airlines, could not be regarded as an integral part of aeronautics activity.

B. CONSTITUTIONAL OBSTACLES

It is clear that the primary constitutional obstacle to federal governmental activity in the field of labour standards lies in the fact that this is a matter primarily reserved to the provinces subject to specific exceptions. It is significant to note that the federal government has respected this constitutional injunction in its existing legislation in labour standards: Canada Labour (Standards) Code Stats. Can. 1964, c.38, s.3 . Any federal attempt to legislate in respect of labour standards in this manner, that is, by creating duties and sanctions directly applicable to individual employers, would have, in the absence of a constitutional amendment, to respect these limitations. There may, however, be alternate methods of accomplishing the desired objectives which do not run into the same constitutional obstacles.

C. OVERCOMING THE OBSTACLES

i) Legislative Alternatives

The federal government might, by a discriminatory exercise of its practically unrestricted taxing power, achieve the desired objectives in the establishment of labour standards. It might, on the one hand, create some kind of a tax advantage for those employers who implemented certain federal "guidelines". Or the federal government might, through the exercise of its power to spend monies raised, assist employers on condition that they meet the "guidelines". The only constitutional objection that might be raised to either of these alternatives is that they amount to colourable devices to achieve indirectly what cannot be achieved directly. Although an argument of this nature was successfully advanced in the Employment and Insurance Act Reference, [1937] A.C. 355, which struck down the federal

attempt to implement a scheme of unemployment insurance through the use of its taxing and spending power, repeated use of conditional grants by the federal authorities has not been successfully challenged; See Angers v. M.N.R., [1957] Ex. C.R. 83, upholding Family Allowances Act. The practice has, however, been subjected to strong political attack and has been modified by the 'opting out' formula: Established Programs (Interim Arrangement) Act Stats. Can. 1965, c.54. Apart from any political challenge to such a use of the taxing power there is little likelihood that it could be legally attacked as unconstitutional legislative activity.

ii) Constitutional Alternatives

The federal government could, through the exercise of its declaratory power under s.92(10)(c), bring those enterprises subject to any declaration within the scope of general federal legislative competence. The jurisdiction open to the Dominion under section 92(10)(c) may be quite extensive. It has from time to time declared such things as grain elevators, flour and feed mills, the Hudson Bay Mining and Smelting Company's plants, and atomic energy plants to be works for the general advantage of Canada. There is no need to justify the conclusion that the subject of the declaration is in fact "for the general advantage of Canada" and the only limitation on the exercise of this power lies in the meaning to be given to the word "work". This is most commonly taken to refer to a physical thing rather than a service (Montreal v. Montreal Street Railway, [1912] A.C. 333) and is distinguished both in s.92(10) and in the jurisprudence from "undertaking" which is "an arrangement under which physical things are used" (Radio Reference, [1932] A.C. 304.) Therefore, any exercise of this declaratory power would have to be confined within these bounds.

Another constitutional alternative worthy of some consideration is that of delegation. Although it is improper for either legislative body to delegate its authority to the other. (A.G.N.S. v. A.G. Can., [1951] S.C.R. 31), it remains open to Parliament or to a provincial legislative to incorporate referentially into its own legislation enactments either existing or future of the other. This device is styled anticipatory incorporation by reference. The achievement of any universally applicable labour standards could thus be accomplished if each province were to incorporate by reference the provisions of, for example, the Canada Labour (Standards) Code. The effect of such action would be simply to extend the application of the Code to all employer-employee relationships and not leave it restricted to those specifically within federal authority.

A variant of this device is that which permits a delegation of administrative authority by Parliament or by a provincial legislature to a subordinate agency of the other: P.E.I. Potato Marketing Board v. H. B. Willis Inc. and A.G. Can., [1952] 2 S.C.R. 392 . In order that this technique be employed in such a manner that it achieve the objective of universal application of common labour standards it would have to be accompanied by an anticipatory incorporating reference. Otherwise all that would have been achieved would be the creation of an administrative body with power to apply both federal and provincial law and if these laws are not uniform then the constitutional obstacle has not been surmounted.

A third constitutional alternative is amendment of the Constitution. More will be said of this in the next section.

D. RECOMMENDATIONS FOR OVERCOMING THE OBSTACLE

Any attempt taken within the present constitution to overcome the constitutional obstacles would be ill-advised. The use of the declaratory power must of necessity be limited by political factors. Even within its limited area of applicability it can do little more than effect a piecemeal extension of standards. Delegation or anticipatory incorporation by reference carries with it an uncertainty and fortuitousness that renders it unsuitable. Its success depends on the likelihood that all the provinces will delegate or incorporate the same power at the same time for the same period and on the same terms and on the assurance that no province would exercise its constitutional right to withdraw its delegation.

It is clear that the best method of achieving the policy objectives in respect of labour standards is through a constitutional amendment. Such action would recognize these matters as having an independent constitutional value, that is, not tied to particular enumerated areas of activity nor subsumed under vague and amorphous categories like "Property and Civil Rights". An amendment to s.91 adding to the list of enumerated subjects the matters under consideration would compliment the responsibility presently vesting in the federal governments over unemployment insurance. It is significant to note that federal competence in the field of unemployment insurance was obtained through such a constitutional amendment. An extension of this development in the field of labour standards simply recognizes the overall responsibility of the federal government in the matter of employer-employee relationships and its social and economic ramifications.

E. AREA OF CONCERN: CRIMINAL JURISDICTION

Object: To define the constitutional law problems, to list the methods of avoiding these difficulties and to suggest the most appropriate method of acting in relation to criminal law, its substantive nature and jurisdiction.

A. JURISDICTION

Criminal law, as a matter of legislative jurisdiction, is assigned to the federal government by section 91(27) of the British North America Act.

Early judicial interpretations of the term lacked any significant indices as to what type of conduct was "criminal" in nature, except that penal consequences had to be involved:

Proprietary Articles Trade Association v. Att.-Gen. of Canada, [1931] A.C. 310. There was little doubt that Parliament had the authority to determine what was "wrongful" conduct and to proscribe it by appropriate legislation, as long as the legislation was not merely a guise for encroachment on a matter of provincial jurisdiction: Att.-Gen. British Columbia v. Att.-Gen. Canada, [1937] A.C. 368; Att.-Gen. Ont. v. Reciprocal Insurers, [1924] A.C. 328.

However, in recent times, the term "criminal law" has been more precisely defined so as to include the maintenance of public peace, order, security, health, and morality: Reference Re Validity of Section 5(a) of the Davies Industry Act, [1949] S.C.R. 1. It has also been held to be a flexible field, expanding with respect to such new matters as the proscription of "crime comics" (Cr. Code, s.150(1)(b), (7)) or of undesirable commercial practices inconsistent with free competition (Combines Investigation Act), and contracting with respect to such matters as the legalization in 1934 of watching and besetting for the purpose of obtaining or communicating information (Cr. Code, s.366(2); Canadian Dairies Ltd. v. Seggie, [1940] 4 D.L.R. 725 (Ont.)).

It would also appear that "criminal law" embraces the power to enact legislation designed for the prevention of crime: Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen, [1956] S.C.R. 303.

Cases decided around the turn of the century had held that criminal law was to be considered in its widest sense: Russell v. The Queen (1882), 7 App. Cas. 829; Att.-Gen. Ontario v. Hamilton Street Railway, [1903] A.C. 524. More recent cases have shown little variation from this broad position insofar as the federal government's legislative activities in the criminal field are concerned. There have been no important cases since the Second World War in which criminal legislation of the federal government has been struck down as ultra vires, the most recent unsuccessful attempt to do being in respect of the Juvenile Delinquent Act: Att.-Gen. British Columbia v. Smith (1968), 65 D.L.R. (2d) 82 (S.C.C.).

The provinces have not been excluded from enacting legislation which prohibits wrongful conduct by means of penal sanctions. Section 92(15) of the British North America Act gives the provinces legislative power to impose fines, penalties or imprisonment for the enforcement of any law of the province made in relation to any matter coming within the classes of subjects in Section 92. This of course relates to enforcement rather than substantive law, but the implication of the existence of provincial offences proscribing wrongful conduct is clear. The difficulty is in ascertaining whether that "wrongfulness" is in relation to one of the enumerated heads of Section 92.

Certainly the mere fact that provincial legislation creates a prohibition does not bring it within the category of criminal law: O'Grady v. Sparling, [1960] S.C.R. 804; R. v. McKay, [1956] O.W.N. 564. On the other hand, the province cannot legislate on questions of public morals, nor can it duplicate or counteract the sanctions of the criminal code: Johnson v. Att.-Gen. Alberta, [1954] S.C.R. 127. There must be a predominant provincial "interest" for provincially-created offences to be intra vires. But this "interest" can exist concurrently with a federal "criminal" interest in some cases: e.g., property legislation designed to prevent the commission of a crime: Bedard v. Dawson and Att.-Gen. Quebec, [1923] S.C.R. 681; highway legislation designed to punish inadvertent negligence. O'Grady v. Sparling, *supra*; securities legislation designed to prohibit the furnishing of false information in a prospectus. Smith v. The Queen, [1960] S.C.R. 776; health legislation designed to prohibit possession of LSD: Regina v. Snyder and Fletcher (1967), 61 W.W.R. (2d) 112 (Alta.); Regina v. Simpson, Mack and Lewis (1968), 67 D.L.R. (2d) 585 (B.C.); and child welfare legislation punishing a parent for failure to provide for the maintenance and education of a child under age sixteen: R. v. Chief (1963), 42 D.L.R. (2d) 712, *aff'd* 44 D.L.R. (2d) 108; Re Gutsch [1959] O.W.N. 273. In all these cases, there is also federal criminal legislation punishing related or similar conduct, yet the courts have upheld the provincial legislation as operating concurrently with the federal, the former to fall in the event of a direct conflict with the latter. Thus in these fields at least, there has been a judicial tendency to uphold provincial

prohibitory legislation even though the federal government has already purported to enter the field with criminal legislation. There is, however, one recent case indicating a moderate withdrawal from the concept of concurrentcy of provincial and federal prohibition legislation, in which the court struck down a Quebec 'act respecting publication [of a magazine] and public morals', since the field of public morals was the exclusive domain of criminal law and had already been substantially occupied by the federal government with ss. 150 to 157 of the Criminal Code: Regina v. Board of Cinema Censors of Province of Quebec (1968), 69 D.L.R. (2d) 512 (Que.).

Section 91(27) of the British North America Act gives Parliament exclusive authority in relation to criminal procedure as well as substantive criminal law. Thus, to the extent that criminal procedure involves matters such as the disposition of fines for violations of federal criminal law or the determination of costs in criminal proceedings or the subpoenaing and fees of witnesses in criminal proceedings, Parliament has exclusive jurisdiction over these and other types of enforcement measures concerning its own criminal legislation. That it can determine fines, penalties and terms of imprisonment for violations of its own criminal legislation is, of course, undoubted.

However, Parliament is not permitted to legislate for the enforcement of provincial offences by penalty or other sanction. The provinces have their own powers of enforcement and sanction for provincial offences in section 92(15) of the British North America Act.

Parliament expressly recognized its disability in the enforcement of provincial legislation in the 1953-54 revision of the Criminal Code, when it dropped the offence of disobeying a provincial statute in section 107.

There have been no judicial limits placed on the provincial enforcement power in section 92(15), either as to the amount of a fine, the severity of a penalty or the length of imprisonment Regina v. Wason (1890), 17 O.A.R. 221; Regina v. Chief, supra.

B. PROBLEM AREAS

There are two possible constitutional obstacles which our recommendations must meet. First, would certain aspects of Parliament's codification of the law respecting the "why", "where" and "when" of picketing be judicially construed as valid legislation in relation to criminal law (particularly that portion of the codification in which penalties and sanctions are prescribed), or would it judicially run afoul of the decision in Toronto Electric Commissioners v. Snider, [1925] A.C. 396, as labour legislation in relation to "civil rights" (section 92(13) of the B.N.A. Act), at least insofar as employees in non-federal works and undertakings were concerned? If the latter, then of course the federal codification or offending parts thereof would be ultra vires, notwithstanding the existence of penal sanctions, as an encroachment on a matter of provincial jurisdiction: Att.-Gen. Ontario v. Reciprocal Insurers, supra.

The second obstacle concerns the possible enactment of provincial legislation relating to the "why", "where" and "when" of picketing which would not duplicate or conflict, but would

operate concurrently with the federal codification but in a manner inconsistent with our recommended legislative policy in this field. As an example, we have recommended that the federal codification permit secondary picketing at the business or operational location of a supplier or customer who allies himself with the employer party to the dispute, and that it not be a violation of the collective agreement for employees of the ally or other workers to refuse to enter the picketed premises.

A particular province might enact picketing legislation which would prohibit all secondary picketing except that directed to consumers only, which legislation might be upheld as valid provincial labour legislation under the concurrentcy doctrine enunciated in O'Grady v. Sparling, supra, notwithstanding the existence of the federal codification. Yet such provincial legislation would undermine the federal policy which we have recommended.

Our recommendations concerning the Criminal Code and the repeal of sections 365 and 367, and the continued existence of sections 366, 410 and 411, do not give rise to any constitutional obstacles. There is no question as to the constitutional validity of these latter sections which are to remain as criminal legislation (or at least exceptions thereto) under Section 91(27) of the British North America Act. The repeal of the section 365 will leave a federal legislative vacuum to be subsumed by the jurisdiction of the Public Interest Disputes Commission as recommended; section 367 matters relating to employer unfair labour practices will be subsumed by the Labour Relations Board as outlined in section C(2).

C. ALTERNATIVES AND RECOMMENDATIONS

With respect to the obstacle relating to the Snider case, it might be overcome by a subsequent judicial reversal of that decision, or by federal-provincial cooperation involving a delegation of the picketing aspect of provincial labour relations jurisdiction to the federal Labour Relations Board, or by constitutional amendment. It is our view that the second method of provincial delegation to the federal board is clearly the most desirable at the present time. The likelihood of obtaining a judicial reversal of Snider is not great, and in any event, would thrust upon the Courts political issues of the nature which are better decided in the legislative arena.

In the event of possible constitutional amendment in this field, we would strongly recommend that the subject of labour relations be designated as the exclusive legislative jurisdiction of the federal government. This would not destroy or impair the present functions of the provincial labour relations boards, as they could be integrated into the federal scheme as either delegates or agents of the central Board.

With the second obstacle, relating to possible provincial concurrent legislation as to the "why", "where" and "when" of picketing which might undermine the policy of the federal codification, the alternatives are the same: new judicial interpretation, federal-provincial cooperation through delegation, and constitutional amendment. Since the concurrency doctrine has largely been restricted to specific legislative fields in which immediate local legislation

was urgently required to meet serious social problems against which the concurrent federal legislation had been largely ineffective (e.g., careless driving, securities frauds, possession of L.S.D., child welfare), it is our view that a Court would not uphold provincial concurrent picketing legislation where the federal legislation as envisaged in our recommendations was sufficient to meet the social problems related to picketing. There would be no "social necessity" vacuum left for the provinces to fill. Accordingly, we would recommend that the concurrency obstacle be left in the first instance, to judicial interpretation. In the event that there was a complete delegation of the picketing aspect of provincial labour relations jurisdiction to the federal Labour Relations Board, then this second obstacle would of course become academic since the possibility of concurrency would then be removed.

If the constitution is amended, problems of a conflict in legislative policy through concurrent legislation of each level of government should be avoided by the placing of all aspects of labour relations, including the various facets of picketing, as matters of exclusive federal jurisdiction.

F. AREA OF CONCERN: PRICES AND INCOMES BOARD

Object: To define the constitutional law problem, to list the methods of avoiding these difficulties and to suggest the most appropriate methods of acting in relation to Prices and Incomes Board.

A. CONSTITUTIONAL ASPECTS OF A PRICES AND INCOMES BOARD

The establishment of an advisory research board with powers to initiate research and to publish conclusions and recommendations on its own or at the request of government is subject to no serious constitutional restraints. As long as the board remains advisory and recommending in nature and is not given power to act in what might be described as a "judicial" capacity, that is, given powers to make decisions concerning certain conduct and to make orders enforcing the observance of certain standards or rules, it may be set up by either level of government or by both levels acting co-operatively. Its composition or terms of reference need reflect no constitutional constraints other than the one mentioned. The topics which it examines need not be limited to topics following within the areas assigned to its creator since its recommendations and conclusions have no legislative effect.

If consideration is given to extending its powers so as to make it a body with power to create and/or enforce substantive rules of conduct then it falls subject to two types of constitutional restrictions. First, the areas in which it would have power to "legislate" or "act judicially" would have to reflect the distribution of legislative authority under the Constitution. Thus, a federally created board could only deal with matters of federal concern. Secondly, insofar as any powers given to such a board would be judicial in nature and insofar as the board would resemble a Court, appointments to it would have to come from the federal Cabinet (S.96 of the B.N.A. Act). Thus, the provinces, though they would be able to create such a board, could not make the appointments. Similarly, any attempt to provide for joint federal-provincial appointments to such a board would offend the requirements of s.96 of the British North America Act.

However, as stated above, a Board with purely research, advisory and recommending powers is subject to none of these constraints and may be constituted in any way that is sought fit.

